

# TTAB

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application  
Serial No. 76/572,253

TRIFOREST ENTERPRISES  
INCORPORATED

Opposer,

V.

NALGE NUNC INTERNATIONAL  
CORPORATION

Applicant.

)  
)  
) **Opposition 91165809**

)  
) For Plastic water bottle, sold empty, in IC 21

)  
) Published in the Official Gazette on  
) 3/18/2005

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Mail Stop TTAB  
Assistant Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

### RESPONSE TO OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT; AND RESPONSE TO RULE 56(f) MOTION

TriForest Enterprises, Inc. (hereafter "TriForest") hereby replies to the opposition to TriForest's motion for summary judgment against Nalge Nunc International Corporation a Delaware Corp., (hereafter "NNI") pursuant to Fed. R. Civ. P. 56. There is no genuine issue of material fact that the asserted NNI trade dress is good looking and has aesthetic functionality as well as being comprised of functional and commonplace features.

#### I. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE HEARD

The motion for summary judgment addresses a key and dispositive issue. The motion was filed after key issues had been clarified between the parties. The board has discretion to consider the motion. The motion is particularly appropriate because it can conserve judicial resources by eliminating an unnecessary trial. TBMP Rule 528.02 states, "The purpose of the motion is judicial economy, that is, to avoid an unnecessary trial where there is no genuine issue



of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result in the case. The summary judgment procedure is regarded as "a salutary method of disposition," and the Board does not hesitate to dispose of cases on summary judgment when appropriate. A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. This burden is greater than the evidentiary burden at trial."

## **II. APPLICANT'S RULE 56(F) REQUEST SHOULD BE DENIED**

Applicant asks the court to delay the motion for summary judgment pending Rule 56(f) request for additional evidence regarding two main areas: TriForest marketing materials, and TriForest documents showing difference in cost of goods. Here, the Rule 56(f) request should be denied because it is unnecessary.

Additional discovery is not necessary because Nalge and TriForest do not have marketing materials touting the utility or aesthetics of the Nalge mark design. TriForest is a manufacturer that sells to knowledgeable bottle distributors, and thus TriForest's marketing philosophy is that providing an actual sample of the product is self-explanatory. TriForest does not tout the aesthetic features of its products. The products are not allegedly infringing the Nalge mark, so the designs are different and irrelevant for this case. Also, the Morton Norwich court considered whether the applicant, not the opposer had marketing materials touting design utility.

The declaration of Denise Reinmann is not controverted when she states that after the initial expense of creating molds, the manufacturing costs for similarly shaped bottles are about the same. The only difference is that the initial setup cost of creating molds is higher because additional features and complications to mold production are disadvantages. Opposer recognizes

that these disadvantages are difficult to quantify in terms of increased mold production cost because this is not a figure that bottle makers typically keep track of. The applicant argues that it needs evidence to argue the motion for summary judgment under Rule 56(f).<sup>1</sup> TriForest complied with the discovery requests and did not produce any documents relating to manufacturing cost because they do not have any documentary evidence that the manufacturing cost would be substantially different. Cost of manufacturing is only relevant in cases where functionality is derived from lower cost of manufacturing such as in the case of a simple bicycle rim design that functional because it was easier to make.<sup>2</sup>

Thus, neither party TriForest or Nalge have documents showing any substantial difference in manufacturing cost of goods. For this motion for summary judgment TriForest is not arguing that the applicant trademark is cheaper to produce, but rather that the applicant trademark has functional advantages. Therefore, the board should rule on the evidence presented. Here, both parties have every incentive to put its best foot forward and does not have an incentive to hide material evidence.

The trademark can be functional for a variety of reasons stated by the Morton Norwich court. The different reasons are called factors. Just because the manufacturing cost is the same and applicant did not admit utility in advertisement does not mean that the applicant bottle is not functionally better either in utility or aesthetics.

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<sup>1</sup> FRCP 56 (f) states, "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

<sup>2</sup> In re Morton-Norwich Products, Inc., 671 F.2d 1332 stated, "It is also significant that a particular design results from a comparatively simple or cheap method of manufacturing the article. In Schwinn Bicycle Co. v. Murray Ohio Mfg. Co., 339 F. Supp. 973, 980, 172 USPQ 14, 19 (M.D. Tenn. 1971), aff'd, 470 F.2d 975, 176 USPQ 161 (6th Cir. 1972), the court stated its reason for refusing to recognize the plaintiff's bicycle rim surface design as a trademark..."

### III. ARGUMENTS AGAINST OPPOSITION TO SUMMARY JUDGMENT

Here, both parties agree that the rule is that a product design trade dress must not be de jure functional and the applicant must prove secondary meaning. TraFFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 58 USPQ2d 1001 (2001); Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 54 USPQ2d 1065 (2000). Each party has also presented arguments relating to the Morton Norwich factors and thus, the underlying law is not disputed.

The facts relating to the Morton Norwich factors are also not in dispute, even though the interpretation of the facts is in dispute. The parties agree that there has not been a utility patent on the whole of the Nalge trademark. The opposer argues that this is not dispositive, and the applicant argues that this fact alone demonstrates lack of functionality. Here, the lack of a utility patent is to be expected because the simplicity of the design would not be novel or unobvious enough to qualify for a patent under patent law. That is why the application is filed in the trademark office, precisely because the applicant is unable to meet the novelty requirement under patent law.

It is also true that the narrow mouth water bottle is relatively wide and does not fit into the standard cup holder. There is no dispute regarding this fact. However, the parties draw different conclusions from this fact. The applicant argues that this makes the design not user-friendly and not utilitarian. The opposer argues that the lack of cup holder interoperability is not a stated limitation of the trademark. Nalge could produce a smaller bottle that could fit into a standard cup holder and still look like the bottle on the trademark drawing page. Furthermore, larger cup holders could be made to hold larger bottles. The applicant has every incentive to argue that certain features are nonfunctional or aesthetic only. The applicant fails to bring up any purely aesthetic features, because there are none. Thus, the applicant falls back on the

argument that the design as a whole is nonfunctional.

There are many different designs on the market. This is also not in dispute. Nalge itself carries a wide variety of different bottle designs. Nalge's own designs all look different from each other yet they argue that the wide mouth and narrow mouth are both trade dress protected. The narrow mouth bottle is one of the designs. The applicant argues that this makes the bottle design nonfunctional, but the opposer argues that the numerous designs all share a common heritage of the basic design being claimed. Thus, the applicant should have the burden of showing nonfunctionality and secondary meaning. The applicant had never submitted any evidence of nonfunctionality or secondary meaning in the trademark prosecution.

There is also no dispute regarding the lack of functionality of the housing top in design patent D238,655 at issue in the Morton Norwich case which dealt with product packaging. The housing top in the Morton Norwich case has several purely ornamental features such as a five sided polygon shape when seen from side view, and a gentle depression in the top when seen from the top. The five-sided polygon shape is easy to design around and would not hurt a competitor or force a competitor to sacrifice any functional advantage. The opposer argues that the Morton Norwich bottle has clearly ornamental features. There is no reason why the side view of the spray housing has to be a five-sided polygon shape and there is no function for the gentle depression on the top of the spray housing.

The applicant says (page 7, applicant's response to motion for summary judgment) that its interrogatory 11 asks for how Nalge decided to select the features of the mark. This is not what interrogatory 11 asks for. Interrogatory 11 ask for why the opposer selected the features of the alleged infringing bottle. Therefore, the parties do not agree about the meaning of the language of interrogatory 11 even though the parties agree on the literal language of the interrogatory.

This does not create a genuine issue of fact that defeats a motion for summary judgment. The court can simply read the interrogatory and see that it asks for opposer's frame of mind, rather than applicant's frame of mind.

Applicant's response to motion for summary judgment (second full paragraph, page 7) argues that the laboratory submarket is somehow sequestered from the drinking bottle submarket. Although there is some degree of separation, there's also some degree of overlap. A distributor selling plastic bottles can sell both to the retail drinking bottle submarket, laboratory submarket, and also to the promotional products submarket. TriForest tries to sell to all three submarkets and is filing this opposition because the trademark would not be limited to drinking bottles while exempting laboratory bottles or promotional products bottles.

The Boston round is a generic term for a round bottle having a rounded neck and sloped shoulders. The parties do not dispute the fact that the round bottle has been used in the laboratory industry for many years. Thus, Nalge should have the burden of proving that the bottle is nonfunctional and has secondary meaning. Nalge tries to shift the burden to the opposer, even though the opposer has already made a prima facie argument regarding functionality. The applicant fails to argue that the tether is not functional, or that the grip or cap is not functional.

It is also undisputed that there have been a wide variety of bottles sold. The applicant considers the TriForest bottle in the first exhibit of the motion for summary judgment to be infringing. In the first exhibit of the motion for summary judgment, there is a side-by-side picture of both products. The Nalge bottle is taller and has a more rounded shoulder and has a narrow grip cap design. The alleged infringing opposer TriForest bottle has a wide grip, and is slightly shorter. The opposer bottle also has a decorative annular protrusion at the base of the

cap. The opposer bottle also has a smaller neck ring. The opposer was forced to make design changes such as reinforcing ribs on the neck and a swirled cap to avoid the Nalge bottle asserted trademark. Next time the opposer considers a new design the opposer would be forced to avoid the very generic Nalge bottle features that are the basic features of tether top water bottles. Nalge considers that changing some feature on the cap may not be enough to avoid the trademark.

The applicant also argues that the great volume of patents would allow anyone to find functionality for any future of any product configuration such as the Chanel or Listerine bottles. The key feature of the Chanel or Listerine bottle is the bevel design. The bevel design is nonfunctional and because it does not make the product better. The housing top in the Morton Norwich case also has an angled type of design. An angled design structure is easier to design around, more distinct, and not as strong as a round structure in the bottle context. Trademark on a round bottle is much more utilitarian and beneficial because round structures are particularly suited for bottle design.

The applicant argues that the patent references are only relevant if they are claimed. The opposer does not consider the context of United States Patent No. 524,159. The drawing page shows a bottle that is generally cylindrical and narrow mouth. The drawing page shows a ring connected to the cap on a tether. This patent shows the utility of a bottle and cap with tether top and ring connection.

Applicant (pg 10, opposition to motion for summary judgment) calls the Nagle mark a "clean-lined" mark suggesting that it is a simple design. Opposer argues that the lack of ornamentation of the current cap and bottle allows printing on the body and neck. The bottles shown in the exhibits attached to the applicant opposition to the motion for summary judgment

are bottles that have bumps, grooves or other surface ornamentation that make the bottles not smooth walled, or not cylindrical. The cylindrical bottle claimed by the applicant is the simplest and the basic design from which all of the other bottles are designed. Surface ornamentation is helpful for improved grip, but they limit available printing area, and resist rolling.

The first bottle mentioned is the discovery 32 oz polycarbonate Sport bottle. The wide mouth bottle (first page of Exhibit 13, opposition to motion for summary judgment) is not functionally equivalent because it is not a narrow mouth bottle. The bottle only looks different because the body has finger grooves and has a short neck. It would be more difficult to pour from this bottle than from the Nalge mark bottle. Also, the logo can only be printed on the smooth face of the bottle. The finger grooves limits the printable area of the bottle. Removing the finger grooves, making the body cylindrical and increasing the length of the neck would infringe on the Nalge mark.

The second bottle is also a 32 oz polycarbonate Sport bottle having finger grooves. Thus, the same arguments would apply. The third bottle with the Schechter logo has finger grooves on the bottom half of the bottle limiting the logo placement to the upper portion of the bottle. The fourth bottle is a Timberland logo bottle manufactured by the opposer. The reinforcing ribs on the neck make the bottle look different than the Nalge mark. It is not disputed that the current opposer bottle is not infringing. The dispute is that Nalge's asserted mark is a simpler design than the opposer's mark, and also simpler than the bottles cited. The Nalge mark is a very basic which if granted would require everyone to add some kind of ornamentation to avoid infringement. The sidewalls of the Nalge bottle and neck are smooth allowing rolling printing on the neck and body. The opposer is unable to print on the current Timberland logo bottle because the current neck has reinforcing ribs.



Exhibit 14 is a catalog from Elite Enterprise Co. Here, applicant cites some wide mouth bottles arguing that people can make bottles without infringing on applicant's trademark at issue. This does not offer an entirely accurate picture of the issue though because the applicant has many product configuration trademark registrations. The applicant has trademark registration 2,755,757 for the wide mouth bottle. The applicant also has trademark registration on a very functional flask mouth as seen in registration number 2,857,283. The applicant also has registration number 2,857,279 for the flask. The opposer considers all three registrations to be functional.

Therefore, the 2166 Elite competition Lexan bottle of Exhibit 14 and the 2366 deluxe handy bottle of Exhibit 14 infringe applicant's separate trademark registration 2,755,757. Applicant's cited bottles of Exhibit 14 thus show the difficulty of avoiding infringement of at least one of applicant's trademarks. With each product configuration trademark, the applicant monopolizes more and more of the bottle market, even though the wide mouth does not infringe on the mark at issue here.

Also, a wide mouth is functionally different from a narrow mouth. The wide mouth allows a person to put a hand into the bottle to clean the bottle. The narrow mouth allows easier pouring. Therefore, the bottles are functionally different. Regarding the remainder of the exhibits on Exhibit 14, the bottle model 2260 and the other bottle under the 2366 model both have surface ornamentation that limit the print area for logos. Also, the TriForest advertisement shows the eight different styles and all of the styles have a variety of surface ornamentation that limit the print for logos. The TriForest wide mouth bottles are definitely not functionally equivalent to the narrow mouth bottles because they have traded pouring difficulty for manual access to the bottle interior.

The bottles presented by the applicant on Exhibit 14 are accurate depictions of the kind of current models in the marketplace that have surface ornamentation. While surface ornamentation may help with grip, they are harder to clean and print on. The cap of the Nalge mark has a cylindrical profile rather than a rounded profile. To avoid the Nalge mark, a rounded profile is required. Thus, the Nalge mark will force everyone to round their caps. A rounded profile for the cap is bulkier than the Nalge mark cap. The mouth of the bottle is cylindrical and thus the Nalge mark cap is space optimized. Space optimized caps have utilitarian function when space is at a premium, such as in a small backpack. On the other hand, rounded caps that are bulkier may possibly be more durable by offering more cushion to the mouth of the bottle where the bottle is the weakest. The fact that rounded caps also have a utility function does not mean that the cylindrical Nalge mark cap does not have a utility function also.


Applicant cited only one product configuration bottle. Trademark registration 1,776,570 has a very distinctive feature and shows that you need a very distinctive and ornamental feature to get a registration for a bottle sold empty. Trademark registration 1,776,570 has a circumferential step on the shoulder that has no functional benefit for the bottle. The step takes more material and would be more complicated to produce than a rounded shoulder or Boston round type. The Trademark registration 1,776,570 bottle holds less because of the aesthetic feature.

The remainder of the registrations cited is for product packaging, not product configuration. The second trademark registrations cited is registration 2,911,918 that is a product package for Fiji spring water. Again, the bevel design of the bottle adds distinctive ornamentation to the package. The bevel does not make it stronger, more durable or increased in volume. The next trademark registration for beverage owned by Talking Rain Beverage

company registration number 2,181,774 has a circumferential radius groove and a pair of circumferential protrusions that serve no functional aspect. The next trademark registration number 2,409,809 cited is the Avalon bottled water held in a bottle that has wavy circumferential bumps, suggesting water waves. The water waves are ornamental, not functional. The next registration number cited is appreciation number 2,970,791 which is for beer sold in a green bottle having the name JAGERMEISTER embossed on the sides of the bottle. Without the special limitations, this bottle would simply be a Boston round bottle. This shows that the general Boston round bottle is not distinctive as a trademark. The next trademark registration cited is registration No. 2,860,078 that is for hot sauce that is in a distinctive bottle having a large bulbous top compared to a tall skinny body. The next trademark cited is registration number 3,036,891 for perfume and the remainder for other types of goods held in bottles that are distinctive and ornamental in one way or another.

To conclude, summary judgment is appropriate here because there are no facts in dispute. The documents applicant presented are not controverted and supports opposer's position. Because the evidence presented so far is sufficient for the board to make a ruling, more discovery and testimony would simply produce more of the same type of evidence being presented. The evidence is not in dispute. Opposer does not dispute that Exhibit 14 is a true and accurate copy of is typically sold in the marketplace. The parties do not argue that the USPTO documents presented by either party are fake or not accurate copies. The parties only disagree on the meaning of the cited references and exhibits.

Respectfully submitted,

By Clement Cheng, Esq.   
17220 Newhope St., Suite 127  
Fountain Valley, CA 92708

Date: 5/12/2006

**PROOF OF SERVICE**

In the matter of trademark application Serial No. 76/572,253

I, the undersigned, declare I am over the age of 18 and not a party to this action. My business address is at 17220 Newhope St., Suite 127 Fountain Valley, CA 92708.

On May 12<sup>th</sup>, 2006 I served:

**RESPONSE TO OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT; AND RESPONSE TO RULE 56(f) MOTION**

By placing true copies thereof in a sealed envelope, addressed as follows to:

*1 copy sent to:*

DONALD F. FREI  
WOOD, HERRON & EVANS, L.L.P.  
2700 CAREW TOWER  
441 VINE STREET  
CINCINNATI, OH 45202-2917  
ATTORNEY FOR APPLICANT

*1 copy sent to:*

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Assistant Commissioner for Trademarks  
P.O. Box 1451  
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- ☐ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the offices of the addressee(s).
- ☒ BY MAIL: I am readily familiar with the practice of the office for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, correspondence is put in the office outgoing mail tray for collection and is deposited in the U.S. Mail that same day in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing shown on this proof of service.
- ☒ FEDERAL: I declare under penalty of perjury under the laws of the United States that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.
- ☐ STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12<sup>th</sup>, 2006, at Fountain Valley, California.



signer

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NALGE NUNC INTERNATIONAL  
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**DECLARATION OF STEVE LIN IN RESPONSE TO OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT; AND RESPONSE TO RULE 56(f) MOTION**

1. My Name is Steve Lin, President of TriForest Enterprises, Inc. (hereafter “TriForest”). I have personal knowledge of the day-to-day operations of the company.
2. TriForest does not have marketing materials touting the utility or aesthetics of the design. TriForest is a manufacturer that sells to knowledgeable bottle distributors, and thus TriForest’s marketing philosophy is that providing an actual sample of the product is self-explanatory. TriForest does not tout the aesthetic features of its products.
3. The declaration of Denise Reinmann is not controverted when she states that after the initial expense of creating molds, the manufacturing costs for similarly shaped bottles are about the same. The only difference is that the initial setup cost of creating molds is higher because additional features and complications to mold production are disadvantages.
4. However, when we first made the bottle shown on Exhibit 1 of the motion for summary

judgment, Denise Reinmann sent us and our distributors cease and desist letters that caused uncertainty in the marketplace. This required us to make additional molds so that additional tooling was required. After we changed the mold, the applicant agreed that the new design did not infringe, but still maintained that the old design infringed. A true copy of the old design is shown in the first exhibit of the motion for summary judgment. TriForest complied with the discovery requests and did not produce any documents relating to manufacturing cost because they do not have any documentary evidence that the manufacturing cost would be substantially different.

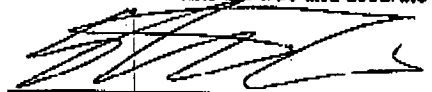
5. Nalge states that the variable costs of producing bottles of different designs are basically the same. Nalge does not have documents or evidence to back that up. TriForest also does not have documents showing any substantial difference in manufacturing cost of goods. For this motion for summary judgment TriForest is not arguing that the applicant trademark is cheaper to produce, but rather that the applicant trademark has functional advantages especially in the cylindrical tethered cap and connection on the 'clean line' cylindrical bottle. TriForest does not have any documentation that shows advertisement touting aesthetic advantages. TriForest ships samples to show people what the product is like.
6. I feel it is really unfair that Nalge can be claiming exclusive right for product design when they are absolutely unable to get a patent for it. The Nalge product is no longer eligible for patent because it has been in the marketplace for over a year.
7. The lack of ability to fit in the cup holder is a direct consequence of this being a BOSTON ROUND LAB Bottle that was not designed as a water bottle but sold as opportune after thought. The bottle as sold by opposer was developed as a media/reagent bottle than sold in the consumer market for hydration and outdoor sports purpose.

8. There are many different designs on the market. This is also not in dispute. Nalge itself carries a wide variety of different bottle designs.
9. Applicant's response to motion for summary judgment (second full paragraph, page 7) argues that the laboratory submarket is somehow sequestered from the drinking bottle submarket. Although there may be some degree of separation, there's also some degree of overlap. A distributor selling plastic bottles can sell both to the retail drinking bottle submarket, laboratory submarket, and also to the promotional products submarket. Opposer has provided many examples where the applicant's distributors are selling the same bottles sold in the lab market for storage of media and reagents to be used for storage of fishing tackles, and nutritional supplements during outdoor ventures.
10. It is also undisputed that there have been a wide variety of bottles sold. Nalge considers the TriForest bottle in Exhibit 1 of the motion for summary judgment to be infringing. In the first exhibit of the motion for summary judgment, there is a side-by-side picture of both products. The Nalge bottle is taller and has a more rounded shoulder and has a narrow grip cap design. The alleged infringing opposer TriForest bottle has a wide grip, and is slightly shorter. The opposer bottle also has a decorative annular protrusion at the base of the cap. The opposer bottle also has a smaller neck ring. The opposer was forced to make design changes such as reinforcing ribs on the neck and a swirled cap to avoid the Nalge bottle asserted trademark. Next time the opposer considers a new design the opposer would be forced to avoid the very generic Nalge bottle features that are the basic features of tether top water bottles. Nalge considers that changing some feature on the cap may not be enough to avoid the trademark.
11. Opposer does not dispute that Exhibit 14 is a true and accurate copy of is typically sold in the marketplace. The parties do not argue that the USPTO documents presented by either party

are fake or not accurate copies. The parties only disagree on the meaning of the cited references and exhibits.

12. I declare under penalty of perjury under the laws of the United States of America that the

above statements are true and accurate to the best of my knowledge.



Steve Lin, President for TriForest

5/11/2006

date



are fake or not accurate copies. The parties only disagree on the meaning of the cited references and exhibits.

12. I declare under penalty of perjury under the laws of the United States of America that the above statements are true and accurate to the best of my knowledge.

---

Steve Lin, President for Triforest

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date

**PROOF OF SERVICE**

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- ☒ FEDERAL: I declare under penalty of perjury under the laws of the United States that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.
- ☐ STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12<sup>th</sup>, 2006, at Fountain Valley, California.



signer

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